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CPLR 302(a)(1): Kramer and Millner Trend Followed

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The requirement that the agency be exclusive in order to attribute the acts of the agent to the principal has prior support. In *Millner Co. v. Noudar, Lda.*,[46] the appellate division, first department, held that where the purported agent is actually an independent broker representing many different companies on an independent basis, in no way under the defendant's control, "the acts of the broker representative . . . are not the acts of the so-called principal, and do not create a basis for jurisdiction against . . . [him]." [47]

The court in the instant case stated that the exclusive agent doctrine applied only to the factual situation presented therein, *i.e.*, where the agent sues the principal. If a third party had sued the defendant, the court indicated, the acts committed on behalf of the defendant by the agent might have been sufficient to confer jurisdiction over the defendant's person.[48]

CPLR 302(a)(1): Kramer *and* Millner *trend followed.*

In *Standard Wine and Liquor Co. v. Bombay Spirits Co.*,[49] the New York Court of Appeals affirmed the decision of the appellate division, first department,[50] and held that the defendant Bombay, which maintained no bank account, telephone listing or warehouse, nor employed any salesmen, nor made any sales within the State, was not transacting business in New York. Consequently, service of process upon it in England, pursuant to CPLR 313, was not sufficient to give the New York courts in personam jurisdiction.

The Court rejected the plaintiff's contention that because defendant's goods were ultimately put into commerce in New York, the defendant was transacting business here.[51] Further, neither the fact that the plaintiff signed the contract in New York, nor the fact that it was bound to boost Bombay's sales within the State, were found to be determinative of a transaction of business in New York.[52]

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[46] 24 App. Div. 2d 326, 266 N.Y.S.2d 289 (1st Dep't 1966).

[47] *Id.* at 328-29, 266 N.Y.S.2d at 291. The *Millner* case is fully discussed in *The Quarterly Survey of New York Practice*, 41 ST. JOHN'S L. REV. 279, 293 (1966). *Cf.* Greenberg v. Lamson Bros. Co., 273 App. Div. 57, 75 N.Y.S.2d 233 (1st Dep't 1947); McKeon v. P. J. McGowan & Sons, 229 App. Div. 568, 242 N.Y.S. 700 (2d Dep't 1930).

[48] Hertz, Newmark & Warner v. Fischman, 53 Misc. 2d 418, 421, 279 N.Y.S.2d 97, 100 (N.Y.C. Civ. Ct. 1967).

[49] 20 N.Y.2d 13, 228 N.E.2d 367, 281 N.Y.S.2d 299 (1967).

[50] 25 App. Div. 2d 236, 268 N.Y.S.2d 602 (1st Dep't 1966).

[51] Standard Wine & Liquor Co. v. Bombay Spirits Co., 20 N.Y.2d 13, 16, 228 N.E.2d 367, 369, 281 N.Y.S.2d 299, 300-01 (1967); *see* Kramer v. Vogel, 17 N.Y.2d 27, 215 N.E.2d 159, 267 N.Y.S.2d 900 (1966).

[52] 20 N.Y.2d at 16, 228 N.E.2d at 369, 281 N.Y.S.2d at 301-02, relying on Singer v. Walker, 15 N.Y.2d 443, 209 N.E.2d 68, 261 N.Y.S.2d 8 (1965).

The present decision follows prior New York case law established in *Kramer v. Vogl*[53] and *Millner Co. v. Noudar, Lda.*[54]

CPLR 308(1): Redelivery doctrine liberalized

The supreme court, Queens County, in *Pitagno v. Staiber*,[55] held that delivery of the summons to the defendant by his wife, who found it in a sealed envelope beneath the mail slot in their home, met the requirements of CPLR 308(1)[56] and constituted valid service. The fact that no affidavit of service had been made was deemed to be immaterial, since testimony given by defendant's wife in open court establishing personal service upon defendant was of greater force than an affidavit would have been.[57]

It should be noted that in the instant case, and in a prior case[58] cited by the court to support its argument, there were compelling circumstances favoring a finding that the service was valid: had the court held the service of process invalid, the causes of action would have been barred by the statute of limitations.[59]

ARTICLE 10 — PARTIES GENERALLY

CPLR 1007: Right of impleader extended to insurer prior to payment of claim.

CPLR 1007 provides that " [a]fter the service of his answer, a defendant may proceed against a person not a party who is or may be liable to him for all or part of the plaintiff's claim against

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[53] 17 N.Y.2d 27, 215 N.E.2d 159, 267 N.Y.S.2d 900 (1966). The Court of Appeals held that the phrase of 302(a) (1), "transacts any business within the state," did not encompass Austrian defendants who carried on no sales, promotion or advertising activities within the State, made all arrangements in Austria and sold their goods, eventually destined for New York, F.O.B. Austria.

[54] 24 App. Div. 2d 326, 266 N.Y.S.2d 289 (1st Dep't 1966). There the court held that the acceptance, signing, and mailing of a contract in New York was not an "act" of the foreign defendant here, nor was it sufficient to warrant the assumption of jurisdiction over it.

[55] 53 Misc. 2d 858, 280 N.Y.S.2d 178 (Sup. Ct. Queens County 1967).

[56] CPLR 308(1) requires that "[p]ersonal service upon a natural person shall be made: (1) by delivering the summons within the state to the person to be served. . . ."

[57] 53 Misc. 2d at 860, 280 N.Y.S.2d at 180-81.

[58] Marcy v. Woodin, 18 App. Div. 2d 944, 237 N.Y.S.2d 402 (3d Dep't 1963) (memorandum decision).

[59] In a recent case, where the action would not have been barred, the court refused to sustain the validity of the service stating that to dispense with the requirement of compelling circumstances to allow a departure from statutory mandate of direct delivery would erase the distinctions between CPLR 308(1) and CPLR 308(3). *See* Miller v. Alda Corp., 53 Misc. 2d 279, 278 N.Y.S.2d 574 (N.Y.C. Civ. Ct. 1967). *See generally The Quarterly Survey of New York Practice*, 42 ST. JOHN'S L. REV. 283, 288 (1967).